Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
WORD NETWORK OPERATING COMPANY, INC. D/B/A THE WORD NETWORK,	)	MB Docket No. 17-166
Complainant,	)	File No. CSR-8938-P
	)	
v.	)	
	)	
COMCAST CORPORATION and **COMCAST CABLE COMMUNICATIONS, LLC,**	)	
Defendants.	)	

TO: Chief, Media Bureau

REPLY TO ANSWER TO COMPLAINT

Markham C. Erickson
Christopher Bjornson
Matthew R. Friedman
STEPTOE & JOHNSON LLP
1330 Connecticut Ave, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel to Word Network Operating Company, Inc. d/b/a The Word Network

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REPLY TO ANSWER TO COMPLAINT

Word Network Operating Company, Inc. d/b/a The Word Network ("TWN") replies to the August 7, 2017 Answer ("Answer") of Comcast Corporation and Comcast Cable Communications, LLC (together, "Comcast") to TWN's above-captioned June 8, 2017 Complaint against Comcast ("Complaint").

INTRODUCTION

TWN through expert analyses and verifiable and sourced data established in its Complaint the following propositions. First, TWN is the leading network in its genre. Among other things, its viewership has waxed even in the face of industry trends showing viewership among religious networks has waned. And in particular, it is a superior network to the Impact Network, with which Comcast replaced TWN on a substantial number of Comcast's systems.

Second, when Comcast's decision to slash carriage of TWN—at no cost savings to Comcast—is juxtaposed with Comcast's decisions to increase distribution of poorly performing affiliated networks—incurring substantial costs by doing so—the case is clear. If TWN were affiliated with Comcast, its distribution would not have been negatively affected. Comcast's treatment of TWN is precisely the behavior about which the Commission was concerned when it adopted the *Comcast-NBCU Order*'s non-discrimination condition ("Non-Discrimination Condition").

In the face of evidence put forward by TWN, Comcast offered in its Answer neither expert analysis nor one single shred of sourced data—not anything—to challenge TWN's proposition. Rather, having secured approval of its merger, Comcast now asserts that the Non-Discrimination Condition does not apply a unique standard for discrimination to Comcast that differs from the standard embodied in existing laws applicable to all MVPDs. In essence, it argues that the behavioral remedy in the *Comcast-NBCU Order* is not a remedy at all.

The question before the Media Bureau ("Bureau") therefore is straightforward, and this is critical to TWN's case. Does the Bureau agree with TWN that the Non-Discrimination Condition is not merely a reference to existing law but rather serves as a unique behavioral remedy that applies to Comcast because of the concerns raised by the merger, and further, it is a remedy independent from the Commission's program carriage rules?

On this question, TWN respectfully urges the Bureau to agree that both a straightforward reading of the *Comcast-NBCU Order* and the program carriage rules, as well as the context in which the Non-Discrimination Condition was adopted, make clear that the Non-Discrimination Condition is independent to, and additive of, the Commission's program carriage rules. To accept Comcast's view, the Bureau must find that the plain, ordinary definition of key terms in the *Comcast-NBCU Order* actually mean the opposite. The Bureau would be required to ignore

the clear context of the Non-Discrimination Condition. If the Bureau agrees with TWN, however, that the Non-Discrimination Condition is independent of, and additive to, the Commission's program carriage rules, then none of Comcast's legal defenses can survive. If the Non-Discrimination Condition is independent, TWN has satisfied all of its burdens when it demonstrated that Comcast discriminated against it by slashing distribution of TWN in a manner it would never apply to its affiliated programmers, whether similarly situated or not.

Comcast additionally fails to show that digital distribution rights cannot constitute an "affiliation" under the *Comcast-NBCU Order*. Comcast relies entirely and inexplicably on non-*Comcast-NBCU Order* authorities—primarily the program carriage rules—in arguing that digital distribution rights cannot establish affiliation for purposes of a discrimination claim under the *Comcast-NBCU Order*. Even assuming, *arguendo*, that "affiliated" entities require common ownership or management in the context of the program carriage rules, Comcast simply assumes, without explanation or support, that "affiliated" as used in the *Comcast-NBCU Order* must have the same meaning. This assumption is wrong and unsupported by Comcast. Moreover, the granting of ownership rights to a company such as Comcast on even a non-exclusive basis can have a value exceeding the Commission's threshold for an attributable interest in an affiliate, and TWN has put forward evidence that Comcast made a demand for such rights.

In addition, Comcast demanded and required a financial interest in TWN as a condition of carriage, as TWN demonstrated through direct testimonial evidence. Although Comcast denies it did so, such competing statements relate not to the legal merits of TWN's case but rather must be evaluated by an Administrative Law Judge as a dispute of fact—and TWN is confident that at such time its witnesses' credibility and statement of the facts will be vindicated. Further, a "financial interest" is not limited to an ownership interest, and Comcast ignores the

purpose of Section 616 in so arguing. Comcast's alleged legislative history is misleading and out of context. It also ignores Commission precedent and misstates what Section 652's "financial interest" represents. Finally, Comcast misrepresents and misunderstands TWN's argument when Comcast argues that TV Everywhere will be jeopardized if the Complaint is allowed to proceed. Negotiations for such rights are lawful; requiring them as a condition for carriage is not.

Finally, Comcast is wrong to claim that TWN cannot bring its complaints that Comcast violated the *Comcast-NBCU Order*'s Exclusivity Condition and Unfair Practices Condition under the Commission's program carriage complaint procedures. The *Comcast-NBCU Order* does not require that these complaints be brought under any specific procedure, and Comcast does not argue that any specific alternative procedure should have been followed. Substantively, Comcast's arguments also fail. The Exclusivity Condition applies to both "agreements" and "arrangements." Comcast demanded TWN's digital rights as a precondition for carriage, which is a unilateral arrangement for carriage. TWN would be precluded in granting those rights to other OVDs, making the incentive for TWN to surrender those rights impermissible. Comcast also misreads the Unfair Practices Condition, which prohibits Comcast from engaging in unfair methods of competition against OVDs that provide video programming online. This condition applies to all actions by Comcast, not just program access decisions. Comcast also misstates the standard for showing a violation of the Unfair Practices Condition. A violation of this condition can occur if Comcast's actions had the purpose of hindering TWN from providing video programming online to subscribers.

ARGUMENT

I. COMCAST DISCRIMINATED AGAINST TWN IN VIOLATION OF THE *COMCAST-NBCU ORDER*'S NON-DISCRIMINATION CONDITION

A. Comcast Asks the Bureau to Interpret the *Order*'s Unambiguous Instruction that the Non-Discrimination Condition Is Independent of, and in addition to, the Commission's Program Carriage Rules to Mean Instead that the Condition Is Dependent on, and Duplicative of, the Commission's Program Carriage Rules.

1. TWN brought its discrimination claim against Comcast under the Non-Discrimination Condition established by the *Comcast-NBCU Order*, which makes clear that to prevail on a complaint under this condition, it will be sufficient for TWN to show that Comcast's decision to slash TWN's carriage was based on its non-affiliation with Comcast.[1] Further, the *Order* unambiguously instructs us that the condition is independent of,[2] in addition to,[3] and broader than,[4] the program carriage rules. Comcast's answer asks the Bureau to ignore not only the *Order*'s unambiguous instruction, but to interpret clear terms as meaning the opposite. Comcast asks the Bureau to determine that the condition is *dependent on*, *identical to*, and *no broader* than the existing program carriage rules. Comcast's answer is supported by neither the

[1] Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4287 ¶ 121 (2011) ("*Comcast-NBCU Order*" or "*Order*") ("If program carriage disputes arise based on this non-discrimination condition, it will be sufficient for the aggrieved vendor to show that it was discriminated against on the basis of its affiliation or non-affiliation.").

[2] *Id.* ("This nondiscrimination requirement will be binding on Comcast *independent* of the Commission's rules") (emphasis added).

[3] *Id.* ("We believe it is in the public interest to adopt *additional* remedies regarding program carriage disputes.") (emphasis added).

[4] *Id.* at 4288 ¶ 123 ("[O]ur existing program carriage rules, together with the requirements we adopt herein, are *sufficiently broad* to encompass a wide range of allegations of discrimination, while allowing Comcast and programming vendors sufficient flexibility to enter into individualized contracts that suit their particularized needs and circumstances.") (emphasis added).

plain meaning of the *Order*, nor by any canon of textual construction. The question before the Bureau, therefore, is straightforward. Is the Non-Discrimination Condition independent of the Commission's program carriage rules? Of course, the Commission already answered this question in the affirmative in its *Order* establishing, explaining, and interpreting the condition. As such, the Bureau must reject Comcast's tortured and nonsensical assertions that the *Order*'s non-discrimination remedy is merely redundant of a remedy that already existed.

2. Comcast's foundational assumption, that the *Comcast-NBCU Order* "did not adopt new standards for program carriage discrimination applicable only to Comcast under the Conditions"[5] is wrong and in direct conflict with the plain meaning of the *Comcast-NBCU Order*. The Non-Discrimination Condition is "independent of the Commission's rules."[6] The concept of independence is straightforward. It means that the Non-Discrimination Condition is "not subject to the control or influence of," "not associated with," and "not dependent or contingent on" the program carriage rules.[7] It is an "additional remed[y]"[8] that expands the ability of independent programmers to bring a program carriage complaint;[9] together, the Non-Discrimination Condition and the Commission's program carriage rules "are sufficiently broad to encompass a wide range of allegations of discrimination," including the one brought here by

[5] Answer ¶ 29. Despite Comcast's position being directly contrary to the plain meaning of the *Comcast-NBCU Order*, Comcast does little to substantively support its assumption. The two supporting sentences Comcast provides are addressed in detail below.

[6] *Comcast-NBCU Order*, 26 FCC Rcd. at 4287 ¶ 121.

[7] *Independent*, Black's Law Dictionary (10th ed. 2014) ("1. Not subject to the control or influence of another; 2. Not associated with another (often larger) entity; 3. Not dependent or contingent on something else").

[8] *See Additional*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/additional (last visited Aug. 25, 2017) ("more than is usual or expected").

[9] *Comcast-NBCU Order*, 26 FCC Rcd. at 4287 ¶ 121.

TWN.[10] The *Comcast-NBCU Order*'s explanation of the adoption of the independent Non-Discrimination Condition is perfectly straightforward:

> Specifically, we condition the approval of this transaction on the requirement that Comcast not discriminate in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection of, or terms or conditions for, carriage, including in decisions regarding tiering and channel placement. If program carriage disputes arise based on this non-discrimination condition, it will be sufficient for the aggrieved vendor to show that it was discriminated against on the basis of its affiliation or non-affiliation.[11]

3. If, as Comcast argues, the Non-Discrimination Condition was identical to the existing program carriage rules, the *Comcast-NBCU Order*'s conditioning of the approval of the transaction on the separate remedy articulated in the *Comcast-NBCU Order* would be rendered meaningless. If the Commission believed that Section 616 and the existing program carriage rules were sufficient to protect independent programmers, it needed only to say so rather than adopt the language in the condition and the explanation in the *Order*.[12] The Bureau must reject,

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[10] *Id.* at 4288 ¶ 123. This language, focusing on the broad coverage of the Non-Discrimination Condition and the FCC's program carriage rules when operating together, and not the broad scope of the program carriage rules on their own, among other things, dispenses with the only other possible interpretation of "independent" (which Comcast did not make)—that "independent" means the Non-Discrimination Condition will apply even in the event the program carriage rules are vacated. If the Commission intended that concept of independence to apply, it would—among other things—have clearly stated this. For example, the Commission's contrasting language adopting the *Comcast-NBCU Order*'s net neutrality condition directly states that such condition is intended to survive any legal challenge to the Commission's net neutrality rules. *See id.* at 4275 ¶ 94 ("Comcast and Comcast-NBCU shall [] comply with all relevant FCC rules, including the rules adopted by the Commission in GN Docket No. 09-191, and, in the event of any judicial challenge affecting the latter, Comcast-NBCU's voluntary commitments concerning adherence to those rules will be in effect.").

[11] *Id.* at 4287 ¶ 121.

[12] *See Qi-Zhuo v. Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995) (it is "a principle of statutory construction [] that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage."); *U.S. v. Ahlers*, 305 F.3d 54, 58 (1st Cir. 2002) (recognizing presumption that "all words and provisions…have meaning and effect," and refusing to adopt construction that "renders any such words or phrases meaningless, redundant, or superfluous").

as it has done, Comcast's self-serving, post-hoc interpretation of the *Comcast-NBCU Order* that asks the Bureau to vitiate the plain meaning—and indeed the plain import—of the text.[13]

4. In addition, rejecting Comcast's requested interpretation is necessary and required by an examination of the context of the Non-Discrimination Condition. The *Comcast-NBCU Order* makes clear that the transaction would not have been approved but for the adoption of the Non-Discrimination Condition and that, under the terms of that condition, a complainant need demonstrate only that a carriage decision would not have occurred but for its non-affiliation with Comcast.[14] Comcast, after having then secured approval of the transaction, must now be estopped from claiming that this critical, "additional" Non-Discrimination Condition does no more than reference a remedy already provided by Section 616 and the existing program carriage rules.[15]

5. The Commission's finding that the transaction could not be approved absent the Non-Discrimination Condition was based on a careful analysis of data that showed that the combination of Comcast and NBC Universal would increase Comcast's ability and incentive to

[13] *See* Bloomberg L.P v. Comcast Cable Communications, LLC, *Memorandum Opinion and Order*, 27 FCC Rcd. 4891, 4894-95 ¶¶ 7-8 (2012) (rejecting Comcast's argument that condition applying when Comcast "now or in the future carries news and/or business news channels in a neighborhood" applies only to "future [channel] lineups" as contradictory to the plain meaning of the condition and inconsistent with the dictionary definition of "now").

[14] *Comcast-NBCU Order*, 26 FCC Rcd. at 4287 ¶ 121 (noting that "[a]lthough [Comcast's voluntary] commitments are helpful, they are not sufficient to allay our concerns" and establishing that "[i]f program carriage disputes arise based on this non-discrimination condition, it will be sufficient for the aggrieved vendor to show that it was discriminated against on the basis of its affiliation or non-affiliation.").

[15] Bloomberg L.P v. Comcast Cable Communications, LLC, *Memorandum Opinion and Order*, 28 FCC Rcd. 14346, 14363 ¶ 35 (2013) ("*Bloomberg Order*") (noting that *Comcast-NBCU Order* condition "was a prerequisite to the Commission's approval of the transaction, to which Comcast agreed; therefore, having secured the benefit of the Commission's conditional approval, Comcast is now foreclosed from challenging the condition").

favor its newly acquired networks over independent networks such as TWN.[16] Indeed, the Commission further found that economic and empirical analysis demonstrated that "Comcast discriminates against unaffiliated programming in favor of its own," despite the existing program carriage rules.[17] The Commission found that Comcast has the incentive and ability to discriminate against unaffiliated programming; that the current rules provide an ineffective check against Comcast's behavior; and that the NBCU transaction would serve only to embolden Comcast. To wit:

> [T]he combination of Comcast, the nation's largest cable service provider and a producer of its own content, with NBCU, the nation's fourth largest owner of national cable networks, will result in an entity with an increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks.[18]

6. Comcast's claim that the Non-Discrimination Condition "relies on nearly identical language" as the language of Section 616 and the Commission's program carriage rules can also be evaluated by comparing the actual text of the three sections.[19] Indeed, Section 616(a)(3) of the Communications Act and Section 76.1301(c) of the Commission's rules are basically identical:

Section 616(a)(3) of the Communications Act	**Section 76.1301(c) of the FCC's rules**
…the Commission shall establish regulations....to prevent a multichannel video programming distributor from *engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly* by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or	No multichannel video programming distributor shall *engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly* by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection,

[16] *See Comcast-NBCU Order*, 26 FCC Rcd. at 4285 ¶¶ 117-18.

[17] *Id.* at 4403 ¶ 70, Appendix B.

[18] *Id.* at 4284-85 ¶ 116.

[19] Answer ¶ 29.

conditions for carriage of video programming provided by such vendors.[20]	terms, or conditions for carriage of video programming provided by such vendors.[21]

7. The same cannot be said of the Non-Discrimination Condition. Here is the language of that condition:

> Comcast shall not discriminate in Video Program distribution on the basis of affiliation or non-affiliation of a Video Programming Vendor in the selection, price, terms or conditions of carriage (including but not limited to on the basis of channel or search result placement).[22]

There is no mention in the *Comcast-NBCU Order* of the critical words: "*engag[e] in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly.*"[23] In fact, the Commission explicitly stated that "[a] vendor proceeding under this condition will not need to also prove that it was unreasonably restrained from competing, as it would under our program carriage rules."[24]

8. Finally, if Comcast's requested interpretation prevailed, no showing of discrimination could be sustained under the Non-Discrimination Condition that would not prevail under the Commission's program carriage rules. Comcast also would have the Bureau believe that TWN must show that Comcast is discriminating in favor of a similarly situated affiliate at both the *prima facie* and merits stages, even when the complaint puts forth direct evidence of affiliation-based discrimination.[25] The similarly situated requirement is not a required showing at the merits stage under the program carriage rules, and it certainly is not a

[20] 47 U.S.C. § 536(a)(3) (emphasis added).

[21] 47 C.F.R. § 76.1301(c) (emphasis added).

[22] *Comcast-NBCU Order*, 26 FCC Rcd. at 4358, Appendix A, Condition III(1).

[23] *See id.* (emphasis added).

[24] *Id.* at 4287 ¶ 121.

[25] Answer at 4 ("the similarly situated showing is essential at both the *prima facie* and merits stages for any claim that affiliation-based discrimination may have occurred under the program carriage rules").

requirement of the broader Non-Discrimination Condition, which requires neither a showing of unreasonable restraint of competition nor the *prima facie* showing of the Commission's rules. If the Commission meant what Comcast now asks the Bureau to say, the *Order* simply would have made clear that concerns raised by independent programmers are already provided for by Section 616 and the program carriage rules. The plain-meaning of the Non-Discrimination Condition and contextual support for interpreting the *Order*'s terms plainly eliminate any possibility that Comcast's preferred interpretation is correct.[26]

B. The Distinction between the Commission's Program Carriage Rules and the Non-Discrimination Condition Invalidates Every Comcast Defense against TWN's Discrimination Claim.

9. If the Bureau rejects—as it must—Comcast's argument that the Non-Discrimination Condition is reliant on and duplicative of the existing program carriage rules, it also must reject each of Comcast's subsequent defenses to the Complaint. TWN is required to show only that Comcast's decision to slash TWN's carriage would not have occurred but for its non-affiliation with Comcast.[27]

10. Comcast's answer must fail because its foundation rests on the untenable proposition that Non-Discrimination Condition is dependent on, identical to, and duplicative of the program carriage rules. If that foundation is removed—which it must—Comcast's subsequent arguments crumble.

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[26] *See Bloomberg Order*, 28 FCC Rcd. at 14358-60 ¶¶ 26-29 (finding the Bureau properly interpreted meaning of *Comcast-NBCU Order* condition and that Comcast's interpretation "would eviscerate the protections that the Commission found necessary to protect unaffiliated news channels and to which Comcast agreed by enabling Comcast to easily evade the condition").

[27] We further note that Jennifer Gaiski's statement to Kevin Adell that Comcast was reducing TWN's distribution "Because we are Comcast, and we can," Complaint ¶ 25, in context can be interpreted only to mean that "we are Comcast," and (implicitly) TWN is not, and Comcast's decision was made for that reason.

Affiliation with the Impact Network.

11. Comcast asserts that "Word's Complaint fails at the starting gate" because the Impact Network is "indisputably *un*affiliated" with Comcast.[28] Of course, having erected an ethereal gate that does not exist in the world of the *Comcast-NBCU Order*, Comcast's criticism cannot stand. TWN does not claim such an affiliation, and no such affiliation is necessary for TWN to prevail. The purpose of our comparison to the Impact Network was meant to anticipate and disprove Comcast's argument that it made a reasoned business judgment that the Impact Network merited expanded carriage relative to TWN. In the Complaint, TWN first demonstrated through expert testimony and concrete facts that TWN leads the Impact Network in their programming genre. Having established this fact, TWN next juxtaposed—through expert testimony and concrete facts—the treatment of TWN with Comcast's poorly performing, affiliated networks. The purpose of this two-step factual construction shows that but for TWN's non-affiliation with Comcast, its carriage would not have been reduced. As explained below, Comcast's discussion of the Impact Network is merely an attempt to establish a pretextual, legitimate business interest where none exists.

Prima facie case requirements for a case brought under Section 76.1301(c).

12. Comcast asks the Bureau to find that the *prima facie* requirement in the program carriage rules applies to complaints for violation of the Non-Discrimination Condition, despite the plain and unambiguous textual instruction to the contrary.[29] The *prima facie* case requirement of Section 76.1302(d) of the Commission's rules applies only to complaints "of a violation of § 76.1301."[30] TWN does not bring a complaint alleging unlawful discrimination in

[28] *See* Answer ¶ 24.

[29] *Id.* ¶¶ 25-27.

[30] 47 C.F.R. § 76.1302(d).

violation of Section 76.1301 but rather for violation of the Non-Discrimination Condition. And the *Comcast-NBCU Order* does not require, nor does Comcast point to anywhere the *Comcast-NBCU Order* even mentions, the establishment of a *prima facie* case under the standards of Section 76.1302(d).[31]

13. Comcast claims that the Commission's 2011 program carriage rulemaking and the *Liberman* case show that "the Commission has twice reaffirmed that the *prima facie* requirement applies to complaints brought under the program carriage discrimination provision."[32] But using the Commission's program carriage *procedures* under Section 76.1702 is not the same thing as bringing a complaint under the non-discrimination provision of Section 76.1301(c). Neither of those two decisions even discusses the *prima facie* requirement in the context of the *Comcast-NBCU Order*. The *Liberman* case, currently under reconsideration, states only what the *Comcast-NBCU Order* already makes clear—complaints under the Non-Discrimination Condition may use the Commission's program carriage complaint procedures.[33] Comcast's reliance on the *2011 Program Carriage Order* is even more egregious as that decision specifically took Comcast to task for its ability and incentive to discriminate against unaffiliated

[31] Applying the *prima facie* case requirement of Section 76.1302(d), which clearly and exclusively applies to complaints under Section 76.1301, to TWN's complaint under the *Comcast-NBCU Order*, would constitute the impermissible establishment of a new regulation, in violation of the Administrative Procedures Act. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("To defer to the agency's [substantive change in] position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation); *see Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1208 (2015) ("*Christensen* held that the agency interpretation at issue was substantively invalid because it conflicted with the text of the regulation the agency purported to interpret.").

[32] Answer ¶ 25; *see* Revision of the Commission's Program Carriage Rules, *Second Report and Order and Notice of Proposed Rulemaking* 26 FCC Rcd. 11494 (2011) ("*2011 Program Carriage Order*"); Liberman Broadcasting, Inc. v. Comcast Corporation and Comcast Cable Communications LLC, *Memorandum Opinion and Order*, 31 FCC Rcd. 9551 (2016) ("*Liberman*").

[33] *Liberman*, 31 FCC Rcd. at 9553 ¶ 5.

programmers. The very paragraph Comcast cites actually notes that the *Comcast-NBCU* "transaction would 'result in an entity with increased ability and incentive to harm competition in video programming by engaging in foreclosure strategies or other discriminatory actions against unaffiliated video programming networks.'"[34] Further, when the *2011 Program Carriage Order* discussed the *prima facie* requirement, it did not discuss the Non-Discrimination Condition or any complaint brought "under this condition,"[35] just complaints "alleging a violation of any of the program carriage *rules*."[36]

14. Comcast claims it is notable that TWN has attempted to comply with all other procedural requirements of Section 76.1302.[37] And this is precisely the point. TWN did so because the *Comcast-NBCU Order* provides that programmers bringing a complaint under the Non-Discrimination Condition may use those procedures.[38] But, on its face, such procedures make clear that the *prima facie* requirement in Section 76.1302(d) applies only to complaints under Section 76.1301 and not complaints brought outside of that section. It cannot be read any other way.

Standards for discrimination.

15. Comcast contends that the *Comcast-NBCU Order* "did not adopt new standards for program carriage discrimination applicable only to Comcast under the Conditions."[39] This is plainly not the case. In the *Comcast-NBCU Order*, the Commission explicitly broadens the kind of discrimination claims that could be brought. Specifically, the Commission determined it

[34] *2011 Program Carriage Order*, 26 FCC Rcd. at 11519 ¶ 33.

[35] *See Comcast-NBCU Order*, 26 FCC Rcd. at 4287 ¶ 121.

[36] *2011 Program Carriage Order*, 26 FCC Rcd. at 11502 ¶ 11 (emphasis added).

[37] Answer ¶ 26.

[38] *Comcast-NBCU Order*, 26 FCC Rcd. at 4358, Appendix A, Condition III(4).

[39] Answer ¶ 29.

would be sufficient to show that TWN was discriminated against on the basis of its non-affiliation with Comcast. A programmer does not need to prove that it was unreasonably restrained from competing, as it would under the program carriage rules. And because the programmer would be proceeding "under this condition,"[40] the limitations of Section 76.1302 of the Commission's rules that only apply to complaints brought under Section 76.1301, such as the *prima facie* case requirement, are not applicable. What the Commission did not do was set up new *procedures* for filing complaints, instead using the existing process for general pleading requirements, pre-filing notification, complaint contents, answers, replies, time limits for filing and responses, remedies for violations, and petitions for temporary standstill.[41]

16. The *Order*'s nondiscrimination standard is not unlimited, as Comcast claims. Rather, it simply means that Comcast has an obligation to treat unaffiliated programmers with the same care and standards (but not necessarily the same results) that it would treat its own affiliates. It must not treat an independent programmer differently because of its non-affiliation. TWN has not argued, and the Non-Discrimination Condition does not require, "that any and all unaffiliated networks receive parity of distribution with any and all affiliated networks"[42]—Comcast retains its ability to "engage in legitimate, aggressive negotiations" and make programming carriage decisions based on legitimate business reasons.[43]

A similarly situated affiliated programmer is not even a requirement of the program carriage rules, much less the Comcast-NBCU Order.

17. Throughout its answer, Comcast emphasizes that TWN can prevail on a discrimination claim only if Comcast discriminates in favor of a similarly situated affiliate. This

[40] *Comcast-NBCU Order*, 26 FCC Rcd. at 4287 ¶ 121.

[41] *See id.* at 4358, Appendix A, Condition III(4); 47 C.F.R. § 76.1302(a-c, e-k).

[42] Answer ¶ 36.

[43] *Comcast-NBCU Order*, 26 FCC Rcd. at 4288 ¶ 124.

is not even true of Section 616[44] or the Commission's rules.[45] And it certainly is not true of the 'broad[er]" Non-Discrimination Condition.[46] The similarly situated showing is but one of two paths to a *prima facie* showing under the program carriage rules (direct evidence of discriminatory intent being the other).[47] But Section 76.1302(d) applies only to complaints brought under Section 76.1301 of the Commission's rules, not complaints brought under the Non-Discrimination Condition.[48] And, of course, the *Comcast-NBCU Order* makes no mention of the need for a "similarly situated" affiliate, just discrimination on the basis of affiliation or non-affiliation.[49]

18. As with program carriage complaints brought under Section 76.1301(c) using direct evidence, it is enough that Comcast discriminated in favor of *any* of its affiliates, not just the similarly situated ones, under similar circumstances. The similarly situated showing is but one way to get the remedies available to a programmer against Comcast's discriminatory behavior. It is a subset of the total box of remedies following the adoption of the *Comcast-NBCU Order*; it is not the box.

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[44] *See* 47 U.S.C. § 536(a)(3).

[45] *See* 47 C.F.R. § 76.1302(d)(3)(iii)(B)(1).

[46] *See Comcast-NBCU Order*, 26 FCC Rcd. at 4288 ¶ 123.

[47] 47 C.F.R. § 76.1302(d)(3)(iii)(B)(1, 2); *see also 2011 Program Carriage Order*, 26 FCC Rcd. at 11503-04 ¶¶ 13-14. Ironically, the Commission viewed the similarly situated path as an addition to its then-existing program carriage rules. *See id.* In any event, the evidence presented in the declaration from TWN CEO Kevin Adell could satisfy a finding of "direct evidence" as it presents "an affidavit from a representative of the programming vendor involved in the relevant carriage negotiations detailing the facts supporting a claim that a representative of the defendant MVPD informed the vendor that the MVPD took an adverse carriage action because the vendor is not affiliated with the MVPD[, which] will generally be sufficient to establish this element of a *prima facie* case." *Id.* at 11504 ¶ 13; Declaration of Kevin Adell ¶ 25 ("Adell Decl."), attached as Exhibit 1 to the Complaint.

[48] 47 C.F.R. § 76.1302(d) ("In order to establish a *prima facie* case of a violation of §76.1301, the complainant must…").

[49] *Comcast-NBCU Order*, 26 FCC Rcd. at 4358, Appendix A, Condition III(1).

Discrimination in the Comcast-NBCU Order applies to more than just close substitutes.

19. Comcast cites to the *Comcast-NBCU Order*'s discussion of Comcast's new ability to harm "unaffiliated networks that are close substitutes for or rivals with Comcast-affiliated networks" as evidence that the Commission intended to limit the Non-Discrimination Condition to similarly situated affiliates.[50] But the Commission was not merely concerned with similarly situated networks to Comcast's affiliated programming. It also was concerned with Comcast's ability to negatively influence competition in video programming generally.[51] The acquisition of 15 new cable programming networks raised concerns that Comcast would populate its cable platform with these networks—and unfairly preserve and promote their carriage—to the detriment of independent programmers that would suffer in relation to such preferential treatment.[52]

20. The Commission's reference to "close substitutes" here was merely illustrative of the claim that the combined entity would have an added ability and incentive to undertake discrimination against unaffiliated networks.[53] As an illustrative example, the Commission did not mean for the example to cabin what kind of complaints could be made. If the Commission had wanted to so limit the Non-Discrimination Condition, it would have done so explicitly and it certainly would not have indicated that it was making the condition "sufficiently broad to encompass a wide range of allegations of discrimination."[54] And of course, it would not have

[50] Answer ¶ 31.

[51] *Comcast-NBCU Order*, 26 FCC Rcd. at 4284-85 ¶ 116.

[52] *Id.* at 4284-85 ¶ 116-18; *id.* at 4411, Appendix D.

[53] *Id.* at 4286 ¶ 119.

[54] *Id.* at 4288 ¶ 123.

specifically expanded the definition of discrimination by eliminating the showing that the independent programmer was unreasonably restrained from competing.

21. Comcast's invocation of Section 616's history is not relevant. Comcast cites to the legislative history for the proposition that Section 616 "expressly preserved Comcast's (and all other MVPDs') rights to engage in robust program carriage negotiations and to make editorial and business judgments as to the value offered by the networks to Comcast customers."[55] The *Comcast-NBCU Order* contains similar, but more limited wording, noting that the Non-Discrimination Condition allows "Comcast and programming vendors sufficient flexibility to enter into individualized contracts that suit their particularized needs and circumstances."[56] TWN does not dispute the *Order*'s construction. The question at hand is not whether Comcast and programmers have the flexibility to enter into individualized contracts that suit their needs, but rather whether Comcast made its decision to slash carriage of TWN based on a legitimate business consideration or because of TWN's non-affiliation with Comcast.

22. Additionally, Comcast cites to the Commission's recent decision in the *GSN v. Cablevision* proceeding for the proposition that an MVPD's general favoritism toward its affiliates is insufficient to support a program carriage complaint under the program carriage rules.[57] But the Complaint is not based on Comcast's general favoritism; it is based on a factually supported two-step juxtaposition that demonstrates that Comcast's decision to slash TWN's distribution would not have occurred but for its non-affiliation with Comcast.

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[55] Answer ¶ 36.

[56] *Comcast-NBCU Order*, 26 FCC Rcd. at 4288 ¶ 123.

[57] Answer ¶ 36 (citing Game Show Network, LLC v. Cablevision Systems Corp., *Memorandum Opinion and Order*, FCC 17-96 ¶ 33 (July 14, 2017)).

C. Comcast Discriminated against TWN in Violation of the Non-Discrimination Condition, and It Fails to Provide Meaningful Evidence to Demonstrate Its Decision to Slash TWN's Distribution Constitutes a "Reasonable Business Judgment."

23. The Non-Discrimination Condition is straightforward. A complainant alleging a violation of the condition need only "show that it was discriminated against on the basis of its affiliation or non-affiliation."[58] The Complaint makes the case that *but for* its lack of affiliation with Comcast, TWN's distribution would not have been slashed. The Complaint's juxtaposition of TWN—as the leading network in its genre—with Comcast affiliates that perform poorly in their genres demonstrated that Comcast would never take a similar action relative to its affiliated programmers.[59]

24. TWN is a highly regarded and high-quality cable network. TWN provides high-quality ministry programming that is popular with African Americans of all ages, and exclusively features some of the country's most popular ministers.[60] It puts forward a strong, ministry-focused television lineup twenty-four hours a day, seven days a week,[61] on which viewers rely for both spiritual edification and life-improvement programming.[62] TWN submitted an expert report showing that its ratings are comparable or better than other religious networks, and that its ratings have increased and are "bucking the trend" among religious networks.[63] This report is sourced and capable of being verified by the Bureau.

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[58] *Comcast-NBCU Order*, 26 FCC Rcd. at 4287 ¶ 121.

[59] Complaint ¶¶ 49-84.

[60] Declaration of Bishop Charles H. Ellis, III ¶ 7 ("Ellis Decl."), attached as Exhibit 2 to the Complaint.

[61] *Id.*

[62] Complaint ¶ 21.

[63] Expert Report of Mark R. Fratrik and William Redpath ¶¶ 10-11 ("Fratrik and Redpath Report"), attached as Exhibit 4 to the Complaint.

25. Throughout the Complaint and the accompanying declarations, TWN demonstrated that Comcast would never decrease carriage for its own networks under similar circumstances. TWN demonstrated that "Comcast provides broader distribution and pays each a generous per-subscriber fee, even when its networks are underperforming or even failing."[64] Dr. Fratrik and Mr. Redpath observed through their econometric analysis that "Comcast is taking on huge costs for its affiliated programming, providing a discriminatory preferential treatment over the way it treats its non-affiliated networks—TWN, for example, whose carriage it is decreasing even as its ratings increase and even as Comcast incurs no cost for its carriage."[65] Conversely, Comcast rewards its affiliated networks with expanded distribution and increased per-subscriber fees even in the face of decreasing ratings.[66] If TWN had been an affiliate of Comcast, based on how it treats even its poorly performing networks, Comcast would have increased distribution of TWN rather than slash it.[67] None of these facts is meaningfully refuted by Comcast in the Answer or the declarations attached to it.

26. Indeed, in response, Comcast submits neither expert reports nor data that can be tested and verified. Rather, Comcast responds with self-serving, pretextual declaratory statements and conclusions that its "Content Acquisition team conducted a thorough review of the many religious networks carried on Comcast's systems" and that "Comcast reasonably concluded that Word viewers would be able to watch much of the programming they enjoy on other networks if Comcast were to reduce carriage of Word."[68]

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[64] Complaint ¶ 72.

[65] Fratrik and Redpath Report ¶ 16.

[66] Complaint ¶ 75.

[67] *Id.* ¶ 76.

[68] Answer ¶¶ 56-57.

27. Comcast mentions reliance on third-party research that purports to demonstrate "that other religious networks carried by Comcast had greater reach and higher intensity viewership among African Americans than Word."[69] Yet, Comcast does not provide the reports or any specific data point, explain the sufficiency of the limited three and a half week period over which the research was conducted, or even identify the entity that generated the report. Consequently, Comcast's mention of them provides little probative value relative to TWN's expert report, which contradicts the findings of Comcast's unnamed, unsourced third-party report. Comcast claims its decision was also based on a second, internal report. This report purports to find "that Word's programming substantially overlapped with the programming of other religious networks in Comcast's lineup."[70] Yet, again, Comcast does not submit the report as evidence nor provide any data that allows the Bureau or TWN to meaningfully analyze Comcast's conclusions. Comcast provides no evidence that the report accounted for any factor beyond mere "overlap" in preachers, including (1) the extent of such overlap; (2) the quality of a preacher's programming on TWN versus other networks, including whether such programming is first-run; (3) the ratings for overlapping preachers on TWN as compared to the other networks; and (4) whether the other networks carrying an overlapping preacher satisfy the demand for such preacher for Comcast customers no longer able to access TWN.

28. Moreover, Comcast fails to provide evidence of consumer viewing habits to support its decision to drop TWN on a broad regional division-by-regional division basis, rather than, for example, a narrower system-by-system basis that would better account for demand for

[69] *Id.* ¶ 56.

[70] *Id.* ¶ 57.

TWN.[71] Comcast also does not address the substantial concerns of ministers appearing on TWN, such as Bishop Charles Ellis III,[72] who are intimately knowledgably about the demands and needs of religious African Americans,[73] nor address or compare to other networks TWN's substantial and continuing improvements to its state-of-the-art network distribution system and studios.[74] Also lacking from Comcast is any example of Comcast reducing, or even considering reducing, distribution of an affiliated network based primarily upon "third party research," and other "evidence" that Comcast uses in attempt to justify its slashing of TWN's distribution. Put simply, Comcast's answer fails to demonstrate its decision was "borne out by the record and [was] not based on [TWN's] affiliation or non-affiliation."[75]

29. Comcast's suggestion that it made a decision between the Impact Network and TWN[76] is merely a strawman to justify decreasing TWN. Comcast's carriage of TWN and the Impact Network is not an either/or choice—and Comcast did not allege it is so.[77] Comcast added the Impact Network in certain markets where it did not drop TWN, and states it was open to retaining TWN distribution alongside carriage of the Impact Network in additional markets.[78] Comcast also fails to refute, or even address, TWN's objective evidence that it is able to charge

[71] *Id.* ¶ 11 (noting that Comcast dropped TWN in its Northeast and West divisions, but retained TWN in its Central division).

[72] Ellis Decl. ¶ 6 ("The Word Network is an indispensable asset to African Americans across the globe. Without question, it is the leading network in the country for African American religious programming."); *id.* ¶ 13 ("there is no reason why a major cable company would contemplate reducing distribution of TWN.").

[73] *Id.* ¶ 23; Complaint ¶ 67.

[74] Complaint ¶ 52.

[75] *TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 25 FCC Rcd. 18099, 18105 ¶ 11 (2010).

[76] Answer ¶ 58.

[77] *See id.*

[78] *Id.* ¶¶ 11, 15.

substantially higher fees to programmers for its time-slots than the Impact Network, and thus that the market views TWN as a superior network.[79]

30. Comcast's reliance on the Impact Network's supposed "growing array of original programming, including cooking, money management, comedy, and advice shows, among others" rings hallow.[80] Comcast provides no example of such programming, any explanation of how much of the Impact Network's programming comprises such programming, any analysis of why such programming appeals to customers in divisions where TWN was dropped, especially in relation to the Central division where TWN distribution was retained, or any comparison to the diverse programming TWN provides.[81] These failures are especially noteworthy given TWN's expert declaration to the contrary, stating that "the Impact Network's programming is also narrower than TWN's programming, focusing substantially on the ministry of its founder, Bishop Wayne T. Jackson."[82] Comcast's reliance also ignores a critical indicator of popularity, which TWN supports with record evidence: households who receive TWN are increasing the viewership of this network, unlike the other religious networks.[83] And while the Impact Network may have partnered with Comcast on a couple events,[84] Comcast never proposed partnering with TWN on any of the many community events TWN participates in—TWN would gladly have agreed if asked. When TWN offered to partner with Comcast on advertising campaigns,

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[79] Complaint ¶¶ 39, 61; Adell Decl. ¶ 12.

[80] Answer ¶ 58.

[81] *See* Complaint ¶ 53 (TWN provides a diverse lineup of musical artists, live programming, and programming targeting millennials); Ellis Decl. ¶ 7.

[82] Ellis Decl. ¶ 15; *see* Fratrik and Redpath Report ¶ 5 (the Impact Network provides a "similar type of programming as TWN but is of inferior quality in terms of production attributes and other factors.").

[83] Fratrik and Redpath Report ¶ 11. Notably, Comcast fails to provide, or even refer to, any set-top box data to refute this record evidence of TWN's popularity.

[84] Answer ¶ 10.

promotions, and other efforts to improve TWN's brand and address any viewership issues, Comcast rejected that offer.[85]

31. Comcast cites to its limited bandwidth as the single economic reason for its decision to reduce TWN's distribution.[86] While MVPDs cannot carry *every* channel seeking carriage because of bandwidth capacity constraints, such constraints do not negate the requirement that Comcast not discriminate based on non-affiliation.[87] Comcast again does not cite to any factual showing that it lacks bandwidth to carry TWN. And it never establishes any facts showing it has any type of bandwidth crunch. In fact, the opposite is true, as it showed it has the capacity to carry numerous religious networks, including both TWN and the Impact Network in many markets, without any issue.[88] Comcast failed to provide any explanation why it has sufficient bandwidth in its Central division, where distribution of TWN was maintained alongside distribution of the Impact Network, but not in its West and Northeast divisions, which would allow the Bureau to conclude that such distinction is a legitimate decision. Because bandwidth is necessarily finite, and always present in any program carriage dispute, it would

[85] *See* Adell Decl. ¶ 30; *id.* ¶ 11 (TWN broadcasts from major events, including major national conventions and conferences).

[86] Answer ¶ 59. Comcast does not, and cannot, point to subscriber fees as a reason for reducing distribution of TWN. Comcast does not pay TWN any subscriber fee. In fact, TWN pays Comcast to distribute TWN through its Headend in the Sky ("HITS") service, which Comcast admits provides some distribution on Comcast in addition to smaller MVPDs. *See id.* ¶ 59 n.86 (most, but not all, of TWN's distribution through HITS is to smaller cable operators).

[87] Answer ¶ 59 (citing Herring Broadcasting Inc. d/b/a WealthTV v. Time Warner Cable, Inc., Bright House Networks, LLC, Cox Communications, Inc., and Comcast Corporation, *Memorandum Opinion and Order*, 24 FCC Rcd. 12967, 12986 ¶ 39 (2009) and *TCR Sports Broad. Holding, L.L.P. v. FCC*, 679 F.3d 269, 275, 277 (4th Cir. 2012)). Comcast's reliance on these cases additionally fails to acknowledge the substantial increase in bandwidth capacity available on Comcast's all-digital system, as compared to the analog system at issue in the *TCR Sports* case. *See* Derek Harrar, *Going "All-Digital" – Tons More HD and a Faster Internet, Comcast Voices*, http://corporate.comcast.com/comcast-voices/going-all-digital_tons_more_hd_and_a_faster_internet (last visited Aug. 25, 2017).

[88] Answer ¶¶ 11, 15.

preclude all non-affiliated networks from ever succeeding on the merits of a program carriage complaint. The lack of any limited bandwidth also condemns all of Comcast's arguments regarding the Impact Network as it can simply carry both—and does so on many systems.

32. Because Comcast has failed to provide any expert or factual evidence other than non-helpful conclusory statements in declarations in response to TWN's evidence of Comcast's unlawful discrimination in violation of the *Comcast-NBCU Order*, Comcast has not presented "substantial and material questions of fact as to whether [it] engaged in [unlawful] conduct."[89] The Bureau thus should find in favor of TWN based on the pleadings all facts and claims for which Comcast has not put forth meaningful evidence in dispute of TWN's evidence, and designate for hearing all facts and claims that Comcast does dispute.

D. Digital Distribution Rights Can Establish Affiliation and Support a Claim of Discrimination under the *Comcast-NBCU Order*.

33. Comcast relies entirely and inexplicitly on non-*Comcast-NBCU Order* authorities—primarily the program carriage rules—in arguing that digital distribution rights cannot establish affiliation for purposes of a discrimination claim under the *Comcast-NBCU Order*. Even assuming, *arguendo*, that "affiliated" entities require common ownership or management in the context of the program carriage rules, Comcast simply assumes, without explanation or support, that "affiliated" as used in the *Comcast-NBCU Order* must have the same meaning.[90] This assumption is wrong. Despite explicitly incorporating the program carriage

[89] *2011 Program Carriage Order*, 26 FCC Rcd. at 11506 ¶ 17.

[90] Answer ¶ 45. Comcast is further mistaken that "affiliated," as used in the program carriage rules, must be limited to only entities with common ownership or management because the Commission sought comment on whether additional relationships between programming vendors and MVPDs should "be considered 'affiliation' under [the] rules," but never adopted a final rule doing so. *Id.* ¶ 45 n.49 (citing *2011 Program Carriage Order*, 26 FCC Rcd. at 11543-44 ¶ 78). Such a statement, made in the notice of proposed rulemaking section of the *2011 Program Carriage Order*, is not a definitive statement of the Commission's position on the definition of

rules' definition of "attributable interest," the Commission refrained from incorporating the definition of "affiliated" or otherwise indicating that "affiliated" entities require common ownership or management in the context of the Non-Discrimination Condition.[91] The Bureau should reject Comcast's unexplained, unsupported assumption and instead find that the digital rights Comcast demanded, if granted, would create an affiliation between Comcast and TWN and such demand constitutes unlawful discrimination against TWN on the basis of non-affiliation.

34. Even so, the granting of ownership rights to a company such as Comcast on even a non-exclusive basis can have a value exceeding the Commission's threshold for an attributable interest in an affiliate.[92] Comcast made such a demand to TWN.[93] Indeed, the Complaint provides direct testimonial evidence that Comcast demanded substantial, exclusive digital distribution rights from TWN that, if granted, would give Comcast complete control over a significant and valuable portion of TWN's business model, and the ability to foreclose and discriminate against TWN.[94] Protecting this value from usurpation by Comcast is consistent with the core purpose of the "independent" Non-Discrimination Condition—countering Comcast's "increased ability and incentive to…engag[e] in…foreclosure strategies or other discriminatory actions against *unaffiliated* video programming networks."[95] Allowing Comcast

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"affiliated" under the program carriage rules. Nor does the Commission refraining from issuing a subsequent order expanding the meaning of affiliation constitute adoption of any limitation on the meaning of "affiliated" to only entities with common ownership or management.

[91] *Comcast-NBCU Order*, 26 FCC Rcd. at 4355, Appendix A, Condition 1.

[92] Expert Report of Harold W. Furchtgott-Roth ¶ 30 ("Furchtgott-Roth Report"), attached as Exhibit 3 to the Complaint.

[93] Adell Decl. ¶ 32.

[94] Complaint ¶ 99; Furchtgott-Roth Decl. ¶ 30.

[95] *Comcast-NBCU Order*, 26 FCC Rcd. at 4284 ¶ 116 (emphasis added).

unbridled discretion to make digital rights demands from unaffiliated networks, on the other hand, harms the ability of these networks to effectively compete, without any corresponding benefit.

35. Comcast's policy arguments also fail. Recognition that exclusive distribution rights can create an affiliation for purposes of the Non-Discrimination Condition does not "lead to the absurd conclusion that Comcast and most other MVPDs are 'affiliated' with nearly all programmers for purposes of the program carriage rules."[96] The Non-Discrimination Condition applies only to Comcast. It does not apply to other MVPDs.

36. Neither would the granting of "commonplace" TV Everywhere rights to Comcast by a network necessarily require that network to comply with the program access and other conditions of the *Comcast-NBCU Order*.[97] Only networks that Comcast has an "Attributable Interest in" are required to comply with such conditions.[98] Nor could any MVPD ever lawfully demand exclusive linear distribution rights as a condition of carriage, which behavior is prohibited by Section 616 and the program carriage rules.[99]

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[96] Answer ¶ 46.

[97] *Id.*

[98] *Comcast-NBCU Order*, 26 FCC Rcd. at 4356, Appendix A, Condition 1 n.1 (prohibiting Comcast from obtaining an "Attributable Interest in," but not from becoming "affiliated" with, any provider of video programming unless that provider complies with the *Comcast-NBCU Order* conditions).

[99] 47 U.S.C. § 536(a)(2); 47 C.F.R. § 76.1301(b). Comcast's argument that a finding that the digital distribution rights demanded by Comcast from TWN would preclude TWN from bringing a program carriage complaint is a non-sequitur. *See* Answer ¶ 46 n.53. First, TWN would at a minimum retain rights to bring a program carriage complaint under the program carriage rules. Second, TWN refused to grant Comcast exclusive digital distribution rights, did not affiliate itself with Comcast, and therefore is not barred from bringing a complaint for violation of the Non-Discrimination Condition.

E. The First Amendment Is Not Implicated by TWN's Complaint or the *Comcast-NBCU Order*.

37. Comcast claims that only by requiring TWN to demonstrate its programming is similarly situated to a Comcast network can the Non-Discrimination Condition be saved from constitutional infirmity.[100] Of course, first and foremost, Comcast accepted the condition voluntarily and has therefore waived any argument that the condition violates the First Amendment.[101]

38. In any event, however, Comcast cannot successfully argue that a content-agnostic discrimination provision violates the First Amendment. Comcast's trade association made an identical argument in its challenge of the Commission's *2011 Program Carriage Order*, which the U.S Court of Appeals for the Second Circuit rejected.[102] And, the Commission itself rejected this proposition when it implemented the *2011 Program Carriage Order*.[103]

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[100] *See* Answer ¶ 41.

[101] *Bloomberg Order*, 28 FCC Rcd. at 14363 ¶ 35 (noting that *Comcast-NBCU Order* condition "was a prerequisite to the Commission's approval of the transaction, to which Comcast agreed; therefore, having secured the benefit of the Commission's conditional approval, Comcast is now foreclosed from challenging the condition," and rejecting Comcast's argument that such condition violates Comcast's editorial discretion); *Cf. United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) ("Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation…. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected…").

[102] *Time Warner v. FCC*, 729 F.3d 137, 157 (2d Cir. 2013) ("*Time Warner*") (rejecting argument that the Commission's *prima facie* standard "disfavor[s] certain messages or ideas" as supported by "absolutely no evidence").

[103] *2011 Program Carriage Order*, 26 FCC Rcd. at 11518-19 ¶¶ 32, 34 ("[T]he program carriage rules would be subject to, and would withstand, intermediate scrutiny" and "burden no more speech than necessary to vindicate the government's goal of protecting competition and diversity.").

39. Further, TWN does not compare its content to the content of a similarly situated network owned by Comcast, creating less of a First Amendment question than if TWN had asked the Bureau to make such a comparison. Comcast misstates the Second Circuit's teaching on this very point when Comcast asserts that "[a]ccepting Word's theory of discrimination would directly implicate the First Amendment by asking the Commission to usurp Comcast's exercise of its editorial discretion."[104] In *Time Warner*, the court rejected the assertion that Section 616 and the program carriage rules violated the First Amendment because they "treat[] all content equally," just as the Non-Discrimination Condition does.[105] Thus, the court recognized that the similarly situated requirement did have the Commission examine conduct, unlike the statute and the direct evidence requirement, but that "governmental examination of content is content neutral as long as the regulation's purpose is not to disfavor any particular messages or ideas."[106] The court separately rejected the petitioners' argument that the *prima facie* requirement was particularly problematic because it required the Commission to examine programming content.[107]

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[104] Answer ¶ 39.

[105] *Time Warner*, 729 F.3d at 157.

[106] *Id.* at 158; *see Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 97 (2d Cir. 2009) (holding FCC's market-modification order content neutral, despite its consideration of "amount of local programming," where Cablevision had "not alleged, much less proven" order "was based on some illicit content-based motive"); *Hobbs v. County of Westchester*, 397 F.3d 133, 152-53 (2d Cir. 2005) (concluding permit regulation content neutral, although "content of the applicant's proposed presentation [was] examined," because specific content was irrelevant to governmental goal of protecting children); *see also Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 717-18 (D.C. Cir. 2011) (holding regulations content neutral, even though "triggered by whether the programming at issue involve[d] sports," because no evidence FCC sought to disfavor any particular message); *BellSouth Corp. v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998) (holding statute "expressly formulated in terms of content" to be content neutral because "underlying purpose" was not to "favor or disfavor particular viewpoints").

[107] *See Time Warner*, 729 F.3d at 157-59.

40. Comcast points to no precedent showing that the direct evidence part of the Commission's rules is unconstitutional, nor could it because the Second Circuit found otherwise.[108] Moreover, Comcast's argument that reading a similarly situated requirement into the Non-Discrimination Condition is "especially important" given the lack of a requirement that TWN show it was "unreasonably restrained" from competing is unavailing.[109] The Commission's interest in preventing discrimination by Comcast on the basis of affiliation, especially in light of Comcast's "increased ability and incentive to harm competition in video programming,"[110] is substantial, and the Non-Discrimination Condition is narrowly tailored to preventing exactly this discrimination.[111] Comcast provides no explanation why examination of content by the Commission, which a similarly situated requirement necessitates, is required.

41. In any event, Comcast's argument that the Commission's decision to enforce the Non-Discrimination Condition must be content-based lacks merit.[112] TWN alleges that Comcast reduced its carriage based on its status as an unaffiliated network. Indeed, TWN put forth substantial ratings data in its expert reports showing that Comcast treats its affiliated networks better than unaffiliated TWN.[113] This evidence is entirely unrelated to the content of the examined networks. Additionally, while Comcast states that it does not have the bandwidth to

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[108] *Id.* at 156-57. If Comcast's theory were applied to the direct evidence rule, then Comcast would be able to tell non-similarly situated networks that they are not being carried because of lack of affiliation and the Commission could do nothing.

[109] Answer ¶ 42.

[110] *Comcast-NBCU Order*, 26 FCC Rcd. at 4284 ¶ 116.

[111] *See Time Warner*, 729 F.3d at 164 (a regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation.").

[112] Answer ¶ 42 ("Indeed, Word is specifically asking the Commission to stand in judgment of Comcast's carriage decisions based on Word's contention that it is the 'superior' network to Impact.").

[113] *See* Fratrik and Redpath Report ¶¶ 13-18.

carry both the Impact Network and TWN,[114] Comcast does carry both the Impact Network and TWN in the Central division market.[115] The FCC was concerned when it adopted the *Comcast-NBCU Order* with Comcast's acquisition of over a dozen cable networks and the effect that would have on squeezing out unaffiliated networks.[116] This concern is applicable here where Comcast is reducing TWN's distribution.

42. The Non-Discrimination Condition also does not examine content as "part of a governmental effort to suppress a certain message."[117] Rather, it only cares if Comcast discriminated in "the selection, price, terms or conditions of carriage."[118] Indeed, unlike the similarly situated requirement, which requires comparison of programming between two networks, TWN's claim does not require examining content.[119] Additionally, Comcast's claim that carrying TWN would reduce diversity of voices in programming inverts reality.[120] What reduces diversity in programming is basing decisions on affiliation and slashing distribution of a programmer. By decreasing its carriage of programming, Comcast is the threat to diversity, not

[114] Answer ¶ 59.

[115] *Id*. ¶ 11.

[116] *See Comcast-NBCU Order*, 26 FCC Rcd. at 4285-86 ¶ 118 ("The transaction also increases Comcast's incentives to discriminate in favor of its affiliated programming. Upon consummation of the transaction, Comcast will compete with an increased pool of unaffiliated programming vendors offering content that viewers might consider substitutes for its affiliates' programming content and against which it could potentially pursue foreclosure or discrimination strategies in order to favor that content.").

[117] *Time Warner*, 729 F.3d at 158.

[118] *Comcast-NBCU Order*, 26 FCC Rcd. at 4358, Appendix A, Condition III(1).

[119] Of course, TWN's comparison to the Impact Network is similarly for purposes of our two-step factual demonstration of discrimination based on non-affiliation. Specifically, it is provided to show there is no legitimate business reason to slash TWN's distribution.

[120] Answer ¶ 43 n.45.

TWN. TWN simply requests that it be returned to carriage that Comcast had given it before Comcast's decision to discriminate based on TWN's lack of affiliation.[121]

II. COMCAST DEMANDED A FINANCIAL INTEREST IN TWN IN VIOLATION OF SECTION 616 AND THE COMMISSION'S PROGRAM CARRIAGE RULES

43. TWN has put forth direct testimonial evidence that Comcast demanded TWN relinquish certain valuable digital rights as a condition of carriage on Comcast's linear system, which demand constitutes an unlawful demand for a "financial interest" in TWN.[122] Comcast argues that such demand cannot, as a matter of law, constitute a demand for a "financial interest" in TWN in violation of Section 616(a)(1) and the program carriage rules because "financial interest" requires an ownership stake.[123] Comcast relies chiefly on statements of Congressional concern about unaffiliated networks being required to surrender ownership or equity interests as a condition of carriage serving as a rationale for Section 616(a)(1)'s "financial interest" prohibition,[124] but elucidation of such a concern cannot reasonably be read to limit "financial interest" to only ownership interests. Indeed, the cited statement from Congress was given as support for adopting Section 616 generally, including the non-discrimination and exclusive rights demand prohibitions that clearly do not require an ownership interest, not just the "financial interest" prohibition.[125] Comcast's citation to the Commission's statement that the "intent of

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[121] TWN does not oppose the increase of, and does not seek any modification to, Comcast's distribution of the Impact Network. *See* Complaint ¶¶ 102-05.

[122] *Id.* ¶ 94; Adell Decl. ¶ 32.

[123] *See* Answer ¶¶ 49-50

[124] *See id.* (citing statement on Congressional intent in the *Eighteenth Video Competition Report* and the legislative history of Section 616(a)(1)).

[125] S. Rep. No. 102-92, at 24 (1992) (testimony given by Preston Padden, INTV, cited by Comcast, serves as "evidence that programmers are sometimes required to give cable operators an exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system"); *id.* (Section 616 broadly alleviates

Section 616 is to ensure that no cable operator or multichannel distributor can demand ownership interests…," meanwhile, is merely a restatement of another commenter's statement on the issue; it does not evidence the Commission's support for this proposition.[126] The Commission's position is rather that Section 616 protects against a broad range of harmful MVPD practices; Section 616 is intended to prevent MVPDs "from taking undue advantage of programming vendors through various practices, including [but not limited to] coercing vendors to grant ownership interests or exclusive distribution rights to multichannel distributors in exchange for carriage on their systems."[127] These "various practices" include Comcast's demand for TWN's digital distribution rights.

44. Comcast additionally looks to Section 652 of the Communications Act, the only other section of Title VI to use the term "financial interest."[128] But Comcast just assumes without explanation that this modification of "financial interest" with "more than a 10 percent" "clearly refers to an equity or ownership interest."[129] It is not in fact so clear. As Commissioner Tristani noted, a "financial interest" could include more than pure ownership or equity interests:

> [N]either the statute, nor the legislative history, nor the Commission itself has defined what it means to "purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest" in a cable operator. For instance,

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programmers from having to "either deal with operators [] on their terms or face the threat of not being carried").

[126] Answer ¶ 50 n.62 (citing Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage, *Second Report and Order*, 9 FCC Rcd. 2642, 2645 ¶ 8 (1993) ("*1993 Order*") (citing Reply Comments of the Motion Picture Association of America, MB Docket No. 92-265 (Feb. 16, 1993))).

[127] *1993 Order*, 9 FCC Rcd. at 2643 ¶ 1.

[128] 47 U.S.C. § 572(a)-(b) (prohibiting local exchange carriers and cable operators from "acquir[ing] directly or indirectly more than a 10 percent financial interest, or any management interest" in the other).

[129] *See* Answer ¶ 50 n.63.

> does debt count toward the 10 percent "financial interest"? Stock options? Approval of directors? Approval rights over major business decisions, such as whether to enter the telephone business? The list could go on and on, but the point is that these are issues of first impression.[130]

Contrary to Comcast's assertion, where Congress intended to restrict or regulate the ownership of an entity by a cable company, including through the "ownership restrictions" subsection of Title VI of the Communications Act, it did so explicitly, using the term "ownership," not "financial interest."[131]

45. Nor should the Bureau's previous finding that a demand for programming licensing rights constitutes evidence sufficient to make a *prima facie* case of a demand for a "financial interest" be disregarded, as Comcast requests the Bureau do.[132] This decision remains good law. That Comcast settled the NFL's program carriage complaint prior to any Commission decision does not reduce the precedential effect of the Bureau's hearing designation order; indeed, the Bureau, not the full Commission, is empowered to make such *prima facie* determinations. That Comcast planned to feature the relevant licensed content constituting a "financial interest" on an affiliated network did not factor into the Bureau's decision. The Bureau's finding focuses only on Comcast's demand for the rights in such programming, not

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[130] US West, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd. 4402 (1998) (Statement of Commissioner Gloria Tristani).

[131] *See* 47 U.S.C. § 533(c) ("The Commission may prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community served by a cable system"); 47 U.S.C. § 533(d) (prohibiting states and franchising authorities from prohibiting "the ownership or control of a cable system by any person because of such person's ownership or control of any other media of mass communications or other media interests.").

[132] Answer ¶ 51 (discussing Herring Broadcasting, Inc. d/b/a WealthTV, NFL Enterprises LLC, TCR Sports Broadcasting Holding, L.L.P. d/b/a Mid-Atlantic Sports Network v. Comcast Corp., *Memorandum Opinion and Hearing Designation Order*, 23 FCC Rcd. 14787, 14818 ¶ 65 (2008) ("*WealthTV/NFL/MASN HDO*")).

what Comcast said it was going to do with those rights if and when it obtained them.[133] Comcast additionally overstates the effects a finding that exclusive digital distribution rights constitute a "financial interest" would have on the ability of MVPDs to "seek TV Everywhere rights as part of a carriage negotiation.[134] The Commission has been clear, "the program carriage rules merely prohibit a cable operator from *requiring* a financial interest in a video programming vendor as a condition for carriage;"[135] they do not prevent MVPDs from merely seeking, requesting, or negotiating for such rights.[136]

46. Also, Comcast disputes TWN's evidence that Comcast demanded exclusive digital distribution rights as a condition of carriage. This issue involves a dispute of fact, which the Bureau should designate for hearing before an ALJ.[137] TWN has put forward direct evidence of the substantial value of its digital distribution rights, that Comcast made this demand contemporaneous with Mr. Adell's plea to maintain TWN's existing carriage, and that Comcast made clear TWN would not succeed in maintaining such carriage without acceding to such

[133] *WealthTV/NFL/MASN HDO*, 23 FCC Rcd. at 14828-29 ¶ 89 ("We find that the NFL has presented sufficient evidence to make a *prima facie* showing that Comcast indirectly and improperly demanded a financial interest in the NFL's programming in exchange for carriage.").

[134] Answer ¶ 51.

[135] *See 2011 Program Carriage Order*, 26 FCC Rcd. at 11519-20 ¶ 35 (emphasis added).

[136] *WealthTV/NFL/MASN HDO*, 23 FCC Rcd. at 14828-29 ¶ 89 ("the Commission emphasized that [Section 616] 'does not explicitly prohibit multichannel distributors from acquiring a financial interest or exclusive rights that are otherwise permissible,' and thus, that 'multichannel distributors [may] negotiate for, but not insist upon such benefits in exchange for carriage on their systems.'").

[137] *See 2011 Program Carriage Order*, 26 FCC Rcd. at 11498-99 ¶ 6.

demand,[138] thereby demanding a "financial interest" in TWN in violation of the program carriage rules.[139]

III. COMCAST DEMANDED TWN'S DIGITAL RIGHTS IN VIOLATION OF THE *COMCAST-NBCU ORDER*

47. TWN has additionally complained that Comcast violated Condition IV(B)(3) (the "Exclusivity Condition") and Condition IV(G)(1)(a) (the "Unfair Practices Condition") of the *Comcast-NBCU Order* when it demanded that TWN relinquish certain digital rights as a condition of carriage on Comcast's linear system. Comcast's threshold argument that such complaints cannot be brought using the Commission's program carriage complaint procedures makes no sense. First, that programmers "may" bring complaints for violations of the Non-Discrimination Condition (Section III of the *Comcast-NBCU Order* conditions) in accordance with the Commission's program carriage complaint procedures, 47 C.F.R. § 76.1302, cannot reasonably preclude complaints for violations of other conditions stated in other sections of the *Comcast-NBCU Order* conditions from being brought alongside such complaints.[140] Indeed, Comcast provides no authority for such a proposition. Second, Comcast points to no alternative procedural requirement for bringing complaints for violation of the Exclusivity Condition and Unfair Practices Condition that TWN failed to follow. They do not because there is no such procedural requirement. TWN has properly complained about both Comcast's violation of the Non-Discrimination Condition, and the Exclusivity Condition and Unfair Practices Condition.

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[138] Complaint ¶ 95; Adell Decl. ¶¶ 32-35; Furchtgott-Roth Decl. ¶¶ 24, 27-30.

[139] 47 C.F.R. § 76.1301(a) ("No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.").

[140] *Comcast-NBCU Order*, 26 FCC Rcd. at 4358, Appendix A, Condition III(4); *see* Answer ¶ 52.

A. Comcast Violated the *Comcast-NBCU Order*'s Exclusivity Condition.

48. Recognizing the weakness of its procedural argument, Comcast next argues that it did not violate the Exclusivity Condition because it did not "'enter into or enforce' an agreement" that would limit the provision of [TWN] programming to OVDs" because TWN has long made its programming available via its website and third-party apps.[141] Comcast both misstates and misapplies the Exclusivity Condition, and fails to even attempt to engage with TWN's factual allegations in the Complaint. The Exclusivity Condition prohibits Comcast from not only entering into or enforcing "agreements" that forbid, limit, or create incentives to limit a cable programmer from providing its programming to one or more OVDs, but it also prohibits applies not only to "agreements," but also "arrangements" that do so.[142] TWN pled, and Comcast entirely ignores, that "Comcast's refusal to negotiate with TWN for expanded linear distribution unless TWN first agreed to relinquish certain of its digital rights "constitutes a unilateral *arrangement* for carriage on Comcast's MVPD system" that "negatively affects TWN by limiting its ability to retain exclusive online distribution rights for itself, or to grant any distribution rights to a third-party."[143]

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[141] Answer ¶ 53.

[142] *Comcast-NBCU Order*, 26 FCC Rcd. at 4361, Appendix A, Condition IV(B)(3) ("No C-NBCU Programmer shall enter into or enforce any agreement or *arrangement* for carriage on Comcast's MVPD system that forbids, limits or create incentives to limit a broadcast network or cable programmer's provision of its Video Programming to one or more OVDs") (emphasis added). While "agreements" require at least two parties, "arrangements" can be unilateral. *Compare Agreement*, Black's Law Dictionary (10th ed. 2014) ("A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons"), *with Arrangement*, Black's Law Dictionary (10th ed. 2014) ("A measure taken or plan made in advance of some occurrence, sometimes for a legal purpose").

[143] Complaint ¶¶ 89-90.

49. By refusing to negotiate with TWN for expanded linear distribution unless TWN relinquishes certain digital rights—rights which enable TWN to compete with video retrieval services offered by Comcast and which are valuable to TWN and customers[144]—Comcast creates an impermissible incentive for TWN to relinquish such rights, to the detriment of other OVDs. Indeed, granting Comcast exclusive digital rights to TWN would "foreclose the online presence of TWN that the network has developed through substantial effort and investments in recent years,"[145] precluding TWN and other OVDs from distributing TWN entirely. Such a showing is sufficient to demonstrate a violation of the Exclusivity Condition.

B. Comcast Violated the *Comcast-NBCU Order*'s Unfair Practices Condition.

50. Comcast similarly ignores the plain language of the Unfair Practices Condition, which broadly prohibits Comcast from "engag[ing] in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any MVPD or OVD from providing Video Programming online to subscribers or consumers,"[146] arguing that such condition only applies in the program access context.[147] Not so. As Comcast recognizes, this unfair practices prohibition and the other conditions in Section IV(G)(1) "augment the specific requirements of the program access rules *and other matters*."[148] But these "other matters" do not "most logically refer" to the other conditions in Section IV(G)(1); those conditions are doing the augmenting. The better reading is that the Unfair Practices Condition be read broadly to apply to all actions by Comcast, not just those made in the program access

[144] Furchtgott-Roth Decl. ¶ 25.

[145] *Id.* ¶ 27.

[146] *Comcast-NBCU Order*, 26 FCC Rcd. at 4363, Appendix A, Condition IV(G)(1)(a).

[147] Answer ¶ 54.

[148] *Comcast-NBCU Order*, 26 FCC Rcd. at 4273-74 ¶ 89 (emphasis added); Answer ¶ 54 n.72.

context. Indeed, Condition(G)(1)(d) applies broadly to prohibit Comcast from retaliating against any party "exercising (or attempting to exercise) any rights under this Order (regardless of whether those rights pertain to online issues)."[149] Comcast provides no explanation as to why this condition applies broadly to all aspects of the *Comcast-NBCU Order*, but the sister Unfair Practices Condition is limited, despite its plain meaning, to only program access.

51. Comcast also misstates the standard for showing a violation of the Unfair Practices Condition. TWN is not required to show that Comcast's action did in fact hinder significantly or prevent any MVPD or OVD from providing video programming online to subscribers or consumers, only that Comcast's actions had that purpose. TWN makes that showing. Comcast made this demand with knowledge that MVPDs are "less interested in carrying programming whose digital rights were exclusively or even heavily controlled by another MPVD, such as Comcast."[150] The unfairness of Comcast's demand for exclusive digital rights, which "[f]ew if any major networks assign [] to an MVPD such as Comcast" is additionally magnified because "[a]s over-the-top (OTT) video services become more prevalent, TWN's digital rights become even more valuable."[151]

CONCLUSION

52. For the reasons set forth in the Complaint and this Reply, TWN asks that the Bureau hold Comcast in violation of the *Comcast-NBCU Order* and Section 616, and to provide TWN the relief requested in the Complaint, and as necessary, schedule for a hearing before the Administrative Law Judge any material factual disputes.

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[149] *Comcast-NBCU Order*, 26 FCC Rcd. at 4363-64, Appendix A, Condition IV(G)(1)(d).

[150] Furchtgott-Roth Decl. ¶ 29.

[151] *Id.* ¶¶ 26, 30.

Respectfully submitted,

Markham C. Erickson
Christopher Bjornson
Matthew R. Friedman
STEPTOE & JOHNSON LLP
1330 Connecticut Ave, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel to Word Network Operating Company, Inc. d/b/a The Word Network

Kevin Adell
THE WORD NETWORK
20733 West 10 Mile Rd.
Southfield, MI 48075
(855)730-9673

August 28, 2017

VERIFICATION OF KEVIN ADELL

I, Kevin Adell, am the President and Chief Executive Officer of Word Network Operating Company, Inc. d/b/a The Word Network. I verify that I have read this submission. To the best of my knowledge, information and belief formed after reasonable inquiry, this submission is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose.

By: _____
Kevin Adell
President and Chief Executive Officer
Word Network Operating Company, Inc. d/b/a The Word Network

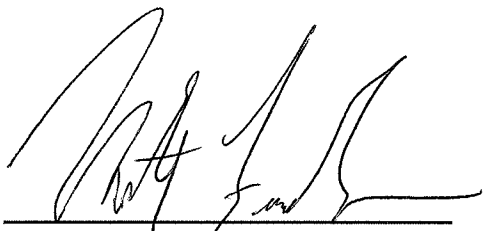
Dated: August 28, 2017

CERTIFICATE OF SERVICE

I, Matthew R. Friedman, certify that on this 28th day of August, 2017, I caused a copy of the foregoing Reply to Answer of Comcast, filed electronically with the Commission this day, to be served on the following:

Lynn R. Charytan (by overnight delivery)
Comcast Corporation
Comcast Center
1701 JFK Boulevard
Philadelphia, PA 19103

Michael D. Hurwitz (by overnight and electronic delivery)
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006-1238
Counsel to Comcast Corporation and
Comcast Cable Communications, LLC



Matthew R. Friedman